No. 09-172

IN THE
Supreme Court of the United States

MICHAEL HALLIWELL & JAMES PARKER,

Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SONOMA,

Respondent,

CHRYSANTHE PAXINOS,

Real Party in Interest

On Petition for a Writ of Certiorari
To the California Supreme Court

PETITION FOR REHEARING

Michael J. Halliwell & James F. Parker
Defendants in Propria Persona
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November 5, 2009

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09-172 CERTIORARI REHEARING PETITION

Since Presiding Judge Nadler sent Defendants his letter of August 18, 2009 justifying his rejection of all of Defendants' attempted filings, because they did not accompany their submissions with Form MC-701 (which says on its face that it is OPTIONAL), Judge Nadler's effort to make Judge Beaupre's Vexatious Litigant Order of April 17, 2009 all encompassing and unappealable has intensified. Because of a complicated foul-up in notification, Defendants did not learn of Judge Nadler's Order to Show Cause (OSC) issued on September 4, 2009, until October 6, 2009.

None of the submissions by Defendants (trying to untangle the Vexatious Litigant snare they find themselves trapped in) constitute "filing new litigation" according to MC-701's own definition ("commencing any civil action or proceeding").

However, Judge Nadler is threatening us with contempt of court sanctions, because some of our submissions are longer than the page limit set by Judge Beaupre for "new litigation," and because we only recently have submitted our attempted filings in affidavit form (as required by Form MC-701). By placing this "sword of Damocles" over Defendants (with an OSC hearing date of December 4, 2009), Judge Nadler has interfered with our ability to effectively prosecute our Supreme Court appeals (09-171, 09-172 & 09-199).

It should be emphasized that Defendants do not seek to involve this Court in the Vexatious Litigant quagmire AT THIS TIME. The step we seek before December 4, 2009, a step which this Court should probably take in ALL cases with a pattern of undisputed facts resembling ours, is to request a response, pursuant to Rule 44.3.

1. Fraudulent turnover of Defendants' $10,118

One aspect of this case is unambiguously clear (and was recognized by Judge Boyd in his Order of July 23, 2008): Under California law, a judgment consisting entirely of attorney fees and other costs, is automatically stayed (without an appeal bond) by CCP §§ 916(a) and 917.1(d), while it is under appeal. (*Ziello v Superior Court* (1999) 75 Cal.App.4th 651, 654-655) On **September 26, 2007**, the day after Judge Rushing announced the $10,000 fees award discussed below, and again on **November 21, 2007**, the day after Judge Rushing erroneously ruled that our prior appeals of this $10,000 award were invalid (notwithstanding CRC 8.750(a) to the contrary), Defendants appealed this $10,000 fees award. The FIRST Appeal Hearing in this case was on **January 28, 2008**. Therefore, Judge Rushing was without jurisdiction to take the action documented below,

and without any semblance of jurisdiction, to act without notification to Defendants or placing any indication of that action in the case file. Appendix H in California Supreme Court proceedings (at 108:23 to 109:12) cites this "smoking gun" re the $10,118 turnover, by Judge Rushing:

> Defendants' Memo to Sheriff Cogbill re Circumvention of Their 11-21-07 Claim of Exemption notes (27:11 to 28:6): "When Defendants contacted the Sheriff's Department (immediately after a remark by Charles Jensen at the January 24, 2008 hearing suggested that he might already have Defendants' $10,118), it was absolutely impossible to come away with anything in writing (in spite of a protracted conversation with staff members who apparently spent HOURS talking with their superiors and Sonoma County Superior Court personnel). Whatever higher official made the decision was not disclosed by the Deputies at the window, but the position was firm: 'We don't give out information to people in your circumstances, you have to check the court file.' It was with the greatest difficulty that we were able to confirm WHEN the Sheriff's Department acted in response to direction by Judge Elaine Rushing (which Defendants needed to know in order to determine WHERE in the chronological Case File and Docket to check.) The acknowledged fact that the process of issuing

a check to Charles Jensen (drawn on our funds) did not begin until November 27, 2007 indicated that whatever the court sent to the Sheriff to facilitate turning over our $10,188 to Charles Jensen was almost certainly not sent until at least five days after our November 21, 2007 Notice of Appeal (and the immediate renewal of Defendants' Claim of Exemption based on having thus eliminated the ground for its denial on November 20, 2007.) *The bottleneck was broken open on* ***May 7, 2008****, when the Sheriff's Civil Bureau Manager Elizabeth J. Warren agreed to release a copy of what Judge Rushing sent to effectuate turning over Defendants' frozen $10,118 to Charles Jensen. It turned out to be a copy of the Courtroom Minutes of 11/20/2007* ***SIGNED AND CERTIFIED ON NOVEMBER 26, 2007.***

On **May 6, 2008**, Judge Rushing signed an unexplained order awarding $20,720 more in attorney fees to Plaintiff's counsel, for nothing more than **reading** our protests re counsel's abuses of Defendants' procedural rights. When this $20,720 penalty did not deter us from exercising our right to appeal, Judge Rushing filed her Vexatious Litigant initiative on **February 9, 2009** (where she absurdly classified our appeals of her fees awards as meeting

the requirement of CCP § 391 of five losing litigations in the preceding seven years). On **February 10, 2009**, Judge Rushing awarded $19,000 more in attorney fees to Charles Jensen, which Defendants appealed on March 10, 2009. Briefing on our **March 10, 2009** appeal was initiated with a May 6, 2009 order, but our May 26, 2006 opening briefs were retroactively invalidated, as a violation of Judge Beaupre's **April 17, 2009** Vexatious Litigant Order). Defendants are NOT trying to unravel the cover-up, which is the purpose of Judge Rushing's Vexatious Litigant initiative, only to show that adequate precedent exists to eventually rectify any fraud we are able to prove, after the fact-finding proceedings in Federal District Court, which we seek.

Hazel-Atlas Glass Company v. Hartford Empire Company (1944) 322 U.S. 238, 241-242 observes:

> After the opinion of the Circuit Court came down on May 5, 1932, quoting the spurious article and reversing the decree of the District Court, Hazel hired investigators for the purpose of verifying the hearsay by admissible evidence. . . . .
>
> In the second interview the investigator asked Clarke to sign a statement telling in detail how the article was prepared, and further asked to see Clarke's files. Clarke replied that he would not "stultify" himself by signing any "statement or affidavit"; and that he would show the records to no one unless compelled by a subpoena.

Plaintiff's attorney also refuses to respond to Defendants' misconduct charges against him. *Hazel-Atlas* explains (322 U.S. at 247) that fraud on higher courts is fully reviewable (especially when a lower court aids and abets such fraud):

> We have, then, a case in which undisputed evidence filed with the Circuit Court of Appeals in a bill of review proceeding reveals such fraud on that Court as demands, under settled equitable principles, the interposition of equity to devitalize the 1932 judgment despite the expiration of the term at which that judgment was finally entered.

Hazel-Atlas observes (322 U.S. at 250):

> The total effect of all this fraud, practiced both on the Patent Office and the courts, calls for nothing less than a complete denial of relief to Hartford for the claimed infringement of the patent thereby procured and enforced. Since the judgments of 1932 therefore must be vacated, the case now stands in the same position as though Hartford's corruption had been exposed at the original trial.

Hazel-Atlas concludes (322 U.S. at 251):

> The judgment is reversed with directions to set aside the 1932 judgment of the Circuit Court of Appeals, recall the 1932 mandate, dismiss Hartford's appeal, and issue mandate to the District Court directing it to set aside its judgment entered pursuant to the Circuit Court of Appeals' mandate, to reinstate its original judgment denying relief to Hartford, and to take such additional action as may be necessary and appropriate.

Shakee Manufacturing Co. v Harford-Empire Co. (1944) 322 U.S. 271, 273 observes:

> While the appeal was pending final disposition in the Circuit Court, Shawkee's counsel communicated with Judge Buffington charging that the Clarke article was spurious; but at that time Shawkee had no direct proof of its charge. That proof, as pointed out in Hazel-Atlas Glass Co. v Hartford Empire Co. (1944) 322 U.S. 238, was available only after the United States offered its evidence in the anti-trust suit in 1941. None of

these facts, we think, should deprive Shawkee and the others of relief against Hartford's fraudulent conduct.

Shakee Manufacturing (322 U.S. at 274) held:

The judgment of the Circuit Court of Appeals is reversed. The cause is remanded to it with directions to set aside its 1934 judgment, recall the mandate, and dismiss the appeal; and issue mandate to the District Court with directions to set aside its judgment finding Hartford's patent valid and infringed, deny Hartford all relief against infringement of this patent and permit Shawkee and the others to bring such further proceedings as may be appropriate in accordance with their prayer for relief.

Matter of Whitney-Forbes, Inc. (1985) 770 F.2d 692, 698, focuses on the key criterion:

Fraud on the court involves a particular type of fraud which is directed to the judicial machinery itself (Bulloch v. United States (1983) 721 F.2d 713, 718) and which involves circumstances where the impartial functions of the court have been directly corrupted.

2. Defendants' penalty for exhausting remedies

By turning over $10,118 of Defendants' funds without mandatory appellate review and eliminating

required appeals on later fees awards, Sonoma County Superior Court has violated *Lindsey v Normet* (1972) 405 U.S. 56, 77, which held:

> This Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review [5 citations] and the continuing validity of these cases is not at issue here. When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. [7 citations]

Charles Jensen demanded an unreviewable $4,000 payment in Judge Nadler's presence and this demand was backed up by Judge Nadler's threat to deny Defendants a jury trial. $4,000 was twice as large as the rent involved in the dispute (which the landlord refused to accept before eviction). Jensen's $4,000 demand had no basis in state law or Sonoma County Superior Court Local Rules (which sets $375 as the standard fee for a **completed** court trial).

The discrimination against Defendants in *Paxinos v Halliwell & Parker*, was as much of a violation of Equal Protection as the broader policy invalidated in *Lindsey v Normet* (1972) 405 U.S. 56, 77, 79:

> The discrimination against the poor, who could pay their rent pending an appeal but cannot post the double bond, is particularly obvious. For them, as a practical matter, appeal is foreclosed, no matter how meritorious their case may be. The nonindigent FED appellant also is confronted by a substantial barrier to appeal faced by no other civil litigant in Oregon. The discrimination against the class of FED appellants is arbitrary and irrational, and the double-bond requirement of ORS 105.160 violates the Equal Protection Clause.

Bankers Life & Casualty Co. v Crenshaw (1988) 486 U.S. 71, 82-83 analyzes the Court's holding in *Lindsey v Normet* (1972) 405 U.S. 56:

> We agreed with the appellants that the double-bond (405 U.S. at 83) requirement violated the Equal Protection Clause. We noted that the requirement was "unrelated to actual rent accrued or to specific damage sustained by the landlord." (405 U.S. at 77) Moreover, the requirement, which burdened only tenants, including tenants whose appeals were nonfri-

> volous, erected "a substantial barrier to appeal faced by no other civil litigant in Oregon." (405 U.S. at 79) We therefore concluded that the requirement bore "no reasonable relationship to any valid state objective" and that it discriminated against the class of tenants appealing from adverse decisions in wrongful-detainer actions in an "arbitrary and irrational" fashion. (405 U.S. at 76-77, 79). As Lindsey demonstrates, arbitrary and irrational discrimination violates the Equal Protection Clause under even our most deferential standard of review.

Boddie v Connecticut (1971) 401 U.S. 371, 379, affirms the "root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." (Accord: *Memphis Light, Gas & Water Division v Craft* (1978) 436 U.S. 1, 19). *Boddie, supra*, notes:

> Our cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question.

Judge Beaupre's April 17, 2009 Order punishes Defendants for filing required discretionary appeals,

and erects a permanent barrier to filing any appeals at all.

United States ex rel. Kennedy v Tyler (1925) 269 U.S. 13, 17 cites a well established basic principle:

> In the regular and ordinary course of procedure, the power of the highest state court in respect of such questions should first be exhausted. When that has been done, the authority of this court may be invoked to protect a party against any adverse decision involving a denial of a federal right properly asserted by him. (Accord: Ex Parte Hawk (1944) 321 U.S. 114, 117-118; Rose v Lundy (1982) 455 U.S. 509, 515; Granberry v Greer (1987) 481 U.S. 129, 134)

Keeney v Tamayo-Reyes (1992) 504 U.S. 1, 10, supports Defendants' thorough documentation:

> In requiring exhaustion of a federal claim in state court, Congress surely meant that exhaustion be serious and meaningful. The purpose of exhaustion is not to create a procedural hurdle on the path to federal habeas court, but to channel claims into an appropriate forum, where meritorious claims may be vindicated and unfounded litigation obviated before resort to federal court. Comity concerns dictate that the requirement of exhaustion is not satisfied by the mere statement of a federal claim in state court. Just as the State must afford the petitioner a full and fair hearing

> on his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolve the claim on the merits.

Picard v Connor (1971) 404 U.S. 270, 275 held:

> We emphasize that the federal claim must be fairly presented to the state courts. If the exhaustion doctrine is to prevent "unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution" (Ex parte Royall (1886) 117 U.S. 241, 251), it is not sufficient merely [to go through the motions].

3. Over-broad First Amendment infringement

Judge Beaupre's April 17, 2009 Order defines "new litigation" so broadly, that it vitiates our First Amendment court access rights. *Alexander v United States* (1993) 509 U.S. 544, 554 observes:

> The doctrine of prior restraint originated in the common law of England, where prior restraints of the press were not permitted, [and] . . . . was held inconsistent with our First Amendment as long ago as Grosjean v. American Press Co., 297 U.S. 233, 246 (1936).

BE & K Construction Co v NLRB (2002) 536 U.S. 516, 530 observes:

> By analogy to other areas of First Amendment law, one might assume that any concerns related to the right to petition must be greater when enjoining ongoing litigation . . . . [since] the First Amendment historically provides greater protection from prior restraints . . . and enjoining a lawsuit could be characterized as a prior restraint.

Judge Beaupre's prior restraint is so broad that it bars appellate review of even his own Vexatious Litigant Finding.

BE & K Construction (536 U.S. at 525) cites *Mine Workers v Illinois Bar Assn.* (1967) 389 U.S. 217, 222, re the Supreme Court's recognition of the First Amendment right to petition as one of "the most precious liberties safeguarded by the Bill of Rights."

Mine Workers v Illinois Bar Assn. (389 U.S. at 221) describes the lower court ruling which the Supreme Court overturns: "The Illinois Supreme Court rejected petitioner's contention that its members had a right, protected by the First and Fourteenth Amendments, to join together and assist

one another in the assertion of their legal rights by collectively hiring an attorney to handle their claims."

Mine Workers (389 U.S. at 222) explains:

> We start with the premise that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press. "All these, though not identical, are inseparable." Thomas v. Collins, (1945) 323 U.S. 516, 530, See De Jonge v. Oregon (1937) 299 U.S. 353, 364. The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil. Schneider v. State (1939) 308 U.S. 147; Cantwell v. Connecticut (1940) 310 U.S. 296.

Mine Workers (389 U.S. at 225) concludes:

> The decree at issue here thus substantially impairs the associational rights of the Mine Workers and is not needed to protect the State's interest in high standards of legal ethics.

Defendants can show in our case, that we have done NOTHING to violate California's Vexatious Litigant Law (CCP § 391). This law has been stretched beyond all recognition to sidetrack federal review of the file tampering, which was used to set our trial date much too early. This premature trial date eliminated any opportunity for discovery, undermined fact finding, and thus vitiated protections against the use of anonymous evidence.

Certificate re Grounds for Rehearing

Self represented Appellants Michael Halliwell and James Parker hereby affirm that this Petition for Rehearing is submitted not for delay, and as the most feasible way of extricating themselves from the effort below to thwart compilation of an accurate factual record, a clear delineation of the legal issues being suppressed, and to make Judge Beaupre's Vexatious Litigant Order of April 17, 2009 into an unappealable law unto itself.

We affirm that our Petition is a good faith effort to inform the Court of controlling developments since our previous submissions, related new case law citations, and a minimum of background to tie in with our October 14, 2009 Supplemental Brief.

_____

Michael Halliwell

_____

James Parker